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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 237

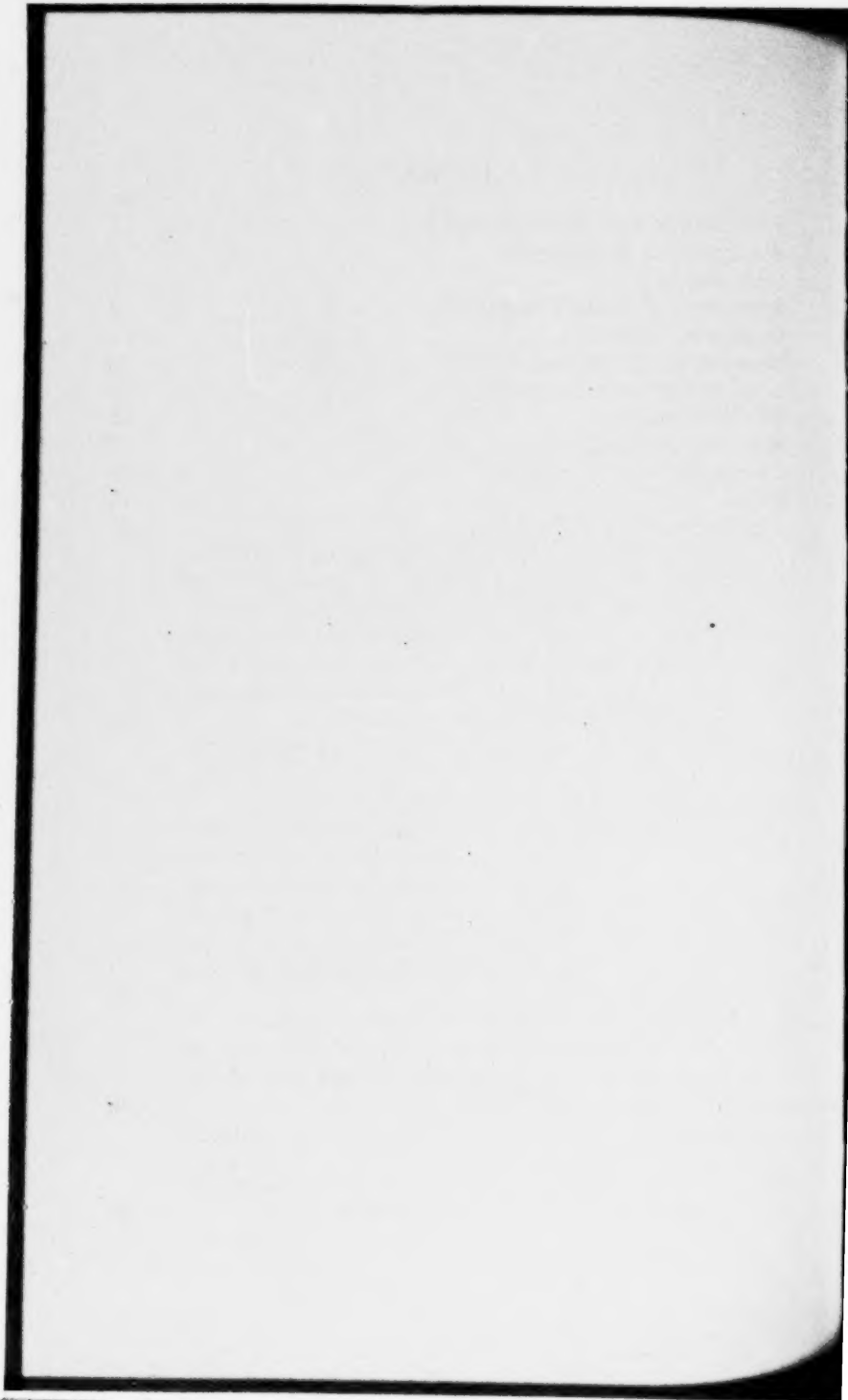
LEOPOLD WILLIAM BRANDENBURG,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERIC M. P. PEARSE,
SAMUEL L. HIRSCHBERG,
MARSHALL R. DIGGS,
CHARLES M. TRAMMELL,
Counsel for Petitioner.



INDEX

	Page
Petition for writ of certiorari	1
Statement of jurisdiction	1
Opinions below	2
Statement of matter involved	2
Questions presented	6
Reasons for allowance of writ	8
Brief in support of petition	11
The indictment	11
Statutes involved	13
The trial	15
Facts	15
Argument	20
Point I—The Circuit Court of Appeals erred in holding that the question of entrapment as presented in this case, where there was no dispute as to the facts on the point, was a matter to be submitted to the jury and in so holding the decision is contrary to opinions of other Circuit Court of Appeals decisions	20
Point II—Did the Circuit Court of Appeals err in affirming the judgment of conviction where the evidence discloses without dispute that the petitioner, a practicing physician, issued prescriptions for morphine sulphate to persons in the employ of the United States Government seeking to entrap him and where the prescriptions were filled by such Government agents for drugs purchased by money furnished by the United States?	24
Point III—Did the Circuit Court of Appeals err in failing to rule as a matter of law that no foundation had been laid by the use of entrapment methods?	36
Point IV—The verdict of the jury was contrary to the charge of the Court based upon the facts proven on the trial of the case, and the Court should have set aside the verdict	37

Page

Point V—The methods employed by the Government agents to entrap the defendant were repugnant to justice and the Court should have granted the motion for judgment of acquittal at the end of the Government's case instead of leaving the question of entrapment to the jury 38

Point VI—The trial court erred in the admission of certain testimony concerning the character of and the examination made by the defendant before he prescribed for his patient 41

Point VII—There was a fatal variance between the charges in the indictment and the proof ... 45

Point VIII—Conceding that both Humphries and VanPelt were drug addicts petitioner did not violate the law in giving them prescriptions ... 46

Point IX—Prejudicial error in the record 48

Point X—The judgment of the United States District Court should have been reversed and set aside by the Circuit Court of Appeals for failure of the District Court, when informed of the conduct of one of the members of the jury and of the presence of his wife in and near the courtroom during the trial 49

Conclusion 56

Table of Cases Cited

155 Fed. (2d) 110 ..... 2, 15
287 U. S. 434 ..... 8, 20
127 Fed. (2d) 827 ..... 8, 21
51 Fed. (2d) 674 22
253 Fed. 862 22
202 Fed. 349 22
72 Fed. (2d) 589 ..... 8, 22
65 Fed. (2d) 993 8
281 U. S. 90 23
43 Fed (2d) 288 23
16 Fed. (2d) 410 23
62 Fed. (2d) 100 24
149 Fed. (2d) 292 24

	Page
215 Fed. 544	24
117 Fed. 2624	24
127 Fed. (2d) 829	25
149 Fed. (2d) 219	8, 9, 25
72 Fed. (2d) 589	8, 25
65 Fed (2d) 993	22, 25
70 Ca. App. 498	26
113 Ga. 1037	27
321 Mo. 1163-1169-1170	27
55 Ga. 391-395	27
32 Fed. (2d) 472	28
254 U. S. 189	30
270 Fed. (2nd C.) 73	30
255 Fed. (4th C.) 621	8, 30
262 Fed. (5th C.) 849	8, 30
297 Fed. (8th C.) 20	8, 30
14 Fed. (8th C.) 518	30
127 Fed. (2d) 827	31
25 Ala. App. 492	
149 So. 354	
221 Ky. 494	
298 S. W. 1101	
2 Cir. 279 F. 253	
254 U. S. 189	30
41 S. Ci. 98	
65 L. Ed. 214	
244 Fed. 991	34
255 Fed. 662	34
8 Fed. (2d) 429-420	38
127 Fed. (2d) 827	38
32 Fed. (2d) 472, 474-5	40
279 Fed. 12	40
261 Fed. 515	40
288 Fed. 520	40
280 Fed. 653-657-658	40
126 Fed. (2d) 118-119	40
10 Fed. (2d) 745	41
62 Fed. (2d) 1007	41
287 U. S. 435-457	8
268 U. S. 5	44, 45

Page
295 U. S. 78 46
93 Fed. (2d) 861 48
295 U. S. 78 49
19 Fed. (2d) 9th C.C. 921 49
20 Fed. (2d) 129 49
289 U. S. 1 54
10 Yerg (Tenn.) 241 55
31 Am. Dec. 573 .....

OTHER AUTHORITIES

16 Corpus Juris 1075, Sec. 2527 54
53 Am. Juri 627 55
22 Corpus Juris Secundum 28
104 Criminal Law Sec. 45(B) .....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 237

LEOPOLD WILLIAM BRANDENBURG,

Petitioner,

against

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Leopold William Brandenburg, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered herein on July 2, 1947, affirming the judgment of conviction of the United States District Court for the District of New Jersey.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and under Sections 687, 688 of Title 18, U. S. C., and the

Rules of Criminal Procedure adopted thereunder, particularly Rule 37(b).

The Circuit Court of Appeals for the Third Circuit affirmed the conviction of the petitioner on July 2, 1947 (R. 457). This petition is filed within thirty days from such date.

Opinions Below

The opinion of the Circuit Court of Appeals for the Third Circuit, which is sought to be reviewed, has not been officially reported, but is attached as an Appendix to the record. Previous to that opinion the petitioner had been tried and convicted in the United States District Court for the District of New Jersey on all eleven counts in the indictment. That judgment of conviction was appealed to the Circuit Court of Appeals and a new trial ordered. That judgment of the Circuit Court of Appeals is reported at 155 Fed. (2) 110. At the second trial petitioner was found not guilty on Count one and guilty on Counts two through eleven, inclusive, in the indictment. That judgment was appealed to the same Circuit Court of Appeals and a copy of its judgment is attached to the record. This is the judgment sought to be reviewed.

Statement of the Matter Involved

The judgment that the Circuit Court of Appeals sought to be reviewed affirmed a judgment of the United States District Court, which convicted the petitioner of violating 26 U. S. C., Section 2554, commonly known as the Anti Narcotic Act, after trial in the United States District Court for the District of New Jersey. The petitioner was tried before a jury and was found guilty on counts two through eleven, inclusive, in the indictment and not guilty on count one. This judgment was affirmed on appeal to

the Circuit Court of Appeals, which is sought to be reviewed by this Court.

The indictment on which petitioner was convicted in substance alleges that the petitioner, a practicing physician, did unlawfully, knowingly, feloniously and willingly, sell, barter, exchange, and give away morphine sulphate, not in good faith and not in the course of his professional practice only by prescriptions with the intent that such persons could obtain said drugs from the druggist by means of said prescriptions, and that such persons did not require the administration of such drugs by reason of any disease; that such drugs were not prescribed for the purpose of treating disease but for the purpose and with intent that they would be used to satisfy the craving of a person addicted to the habitual use thereof. All of the counts in the indictment were identical, except for dates, quantities and names of persons to whom issued. On the first count, which alleged that such a prescription was issued to one James B. Humphries, the petitioner was found not guilty. He was found guilty on the remaining ten counts, five of which allege that prescriptions were given to one James B. Humphries and five counts alleged that they were given to one Ralph B. VanPelt.

After the giving of the prescription to said Humphries, for the issuance of which the petitioner was found not guilty, Humphries was an employee of the United States Government receiving compensation for his services and was acting under the supervision of a narcotic agent, who furnished the money to pay for prescriptions and to pay for the drug.

Previous to the giving of the prescription to said Humphries by the petitioner, upon which the petitioner stands convicted and under sentence of five years in the Federal Penitentiary, there is no evidence of the petitioner having issued any prescriptions for narcotics illegally, nor is there any

evidence of any suspicion of any illegal sale of drugs of any kind or the issuance of any prescriptions prohibited by law or the violation of any law, Federal or State, by the said petitioner except the offense charged in count one of the indictment involved in this case and on which he was found not guilty.

Petitioner had practiced his profession for more than thirty-two years with nothing against his record. He was an honor graduate of the University of Maryland and had taught Medicine at that University. He was in the general practice of medicine and a surgeon.

Humphries, previous to his coming to the petitioner's office, had been a patient of a Dr. Brady, another practicing physician. Dr. Brady had prescribed for him. Before prescribing Dr. Brady obtained a history of gall bladder disease with pain in the abdomen and vomiting. As Dr. Brady was ill he had referred all his patients to the petitioner. Humphries repeated this medical history to the petitioner, who before prescribing had asked for a history of his case. Humphries knew the symptoms of gall bladder disease and falsely and with an intent to deceive the petitioner represented those symptoms to the petitioner. Humphries was in fact a drug addict. A drug addict at times has substantially the same symptoms as a person suffering from gall bladder disease. He represented to the petitioner that he was suffering from pain and was in need of a drug. All prescriptions issued to Humphries show on their face that they were issued for gall bladder trouble.

Counts seven through eleven, inclusive, were based on prescriptions issued to one VanPelt, a narcotic agent, who was brought in to the petitioner's office under the false representation of Humphries, confirmed by VanPelt, that he was Humphries brother-in-law; that he was also a patient of Dr. Brady, and that he had a history of a pre-existing

tuberculosis with collapse of a lung with an involvement of pleura accompanied by sharp pains and suffering on deep breathing. This history was brought out on interrogation by the petitioner before a prescription was issued. Petitioner issued prescriptions to both Humphries and Van Pelt for the purpose of relieving pain and suffering, which was true insofar as Humphries was concerned and represented and pretended to be true insofar as VanPelt was concerned. Only a patient can determine whether he actually has pain.

Both Humphries and VanPelt testified that petitioner made no examination of them, yet both admitted the medical history which was given to the petitioner. All money for prescriptions and for the filling of prescriptions was furnished by the United States Government and filled by government agents or employees.

Narcotic agent, Belmont, made inquiry of petitioner on September 12, 1944 when petitioner had been accused of the offense alleged on that date as to other prescriptions he had written. Petitioner told agent of other prescriptions to one Edna Wempler and one Mary Muller. No criminal offense is alleged or charged on account of these prescriptions and on objection of petitioner's counsel the offer of such prescriptions in evidence was withdrawn by the Assistant United States District Attorney. Yet the statements of petitioner in regard thereto and of circumstances set forth in the evidence surrounding such prescriptions were allowed to remain in the record. The withdrawal of these prescriptions does not purge the record of the effect of such testimony concerning them on the jury.

Another matter involved in this petition for writ of certiorari is the effect of the presence of a wife of a juror and conversations with the wife of petitioner, who was highly prejudiced against petitioner upon the fairness of the trial.

The question is whether the juror might have been influenced by derogatory statements of petitioner's wife communicated to the juror.

Questions Presented

1. Did the Circuit Court of Appeals err in affirming the judgment of conviction where the issue of entrapment was presented and there was no evidence in the record of any previous conviction of petitioner for violating the anti-Narcotic Act or any reasonable basis for a suspicion that he had violated it or intended to violate the Act?

2. Did the Circuit Court of Appeals err in affirming the judgment of conviction where the evidence discloses that the petitioner, a practicing physician, issued prescriptions for morphine sulphate where the prescriptions were filled by a government agent or by a person in the employ of the government and the drugs purchased with money furnished by the United States?

3. Did the Circuit Court of Appeals err in affirming the District Court's decision in which the petitioner was convicted based upon testimony of acts of narcotic agents which went far and beyond affording opportunity or facility for the commission of the crime but actually took a vital part and performed essential acts constituting the crime themselves?

4. Did the Circuit Court of Appeals err in failing to rule as a matter of law that no foundation had been laid for the use of the entrapment methods used by the narcotic agents?

5. Did the Circuit Court of Appeals err as a matter of law in failing to reverse the United States District Court, where it is shown that the crime alleged, if a crime at all, was completed and carried out by agents of the United States Government in that said agents purchased the drugs,

which is a necessary act for the alleged crime to have been completed?

6. Did the Circuit Court of Appeals err in declining to reverse the United States District Court on account of the admission in evidence and the refusal of the District Court to strike from the evidence the direct answer of Humphries and VanPelt, that no examination by the petitioner was made of them previous to prescribing morphine, said direct answers being conclusions of witnesses not qualified to express opinions as to what constitutes an examination by a physician?

7. Did the Circuit Court of Appeals err in affirming the judgment of the United States District Court, which held that what is proper medical practice and proper medical examination was a matter for the jury to determine? Whereas, if the statute in question should be interpreted as permitting such determinations, it would constitute the regulation of medical practice in violation of the Constitution, or would cast doubt on the constitutionality of the Act.

8. Did the Circuit Court of Appeals err in failing to reverse the judgment of the United States District Court due to the fact that the United States District Court permitted testimony with reference to prescriptions given by petitioner to Edna Wempler and Mary Muller and statements related thereto to remain in the record after the offer in evidence of said prescriptions was withdrawn and after the Court had stated that he would not permit such prescriptions to be introduced in evidence? The testimony concerning them is highly prejudiced to petitioner creating entirely erroneous impression on the jury and the fact that the offer of the prescriptions was withdrawn does not purge the record of the harmful effect, since no wrong doing or

illegal act is alleged or charged with respect to those prescriptions.

9. Did the Circuit Court of Appeals err in affirming the judgment of the District Court where it appeared that in order to convict the petitioner it was necessary to prove beyond reasonable doubt that the prescriptions were for larger amounts of morphine than was necessary to treat disease? Whereas, there is no evidence whatever in the record that the quantities prescribed were unreasonable in amount and beyond the needs of one suffering from the disease for which the prescriptions were given.

10. Did the Circuit Court of Appeals err in failing to reverse the District Court judgment where it appeared that the District Court was informed of the conduct of one of the members of the jury and of the presence of his wife in and near the court room during the trial.

Reasons for Allowance of Writ

1. The decision of the Circuit Court of Appeals, sought to be reviewed, appears to be in conflict with the decision of the Circuit Court of Appeals of the Sixth Circuit in the case of *Morei* v. *United States,* 127 Fed. 827; *Jackson* v. *United States,* 297 Fed. 20; *Doremus* v. *United States,* 262 Fed. 849; *Foreman* v. *United States,* 255 Fed. 621; *Wall* v. *United States,* 65 Fed. (2) 993; *Arton* v. *United States,* 3 Fed. (2) 992, and *Strader* v. *United States,* 72 Fed. (2) 589, and seems to be contrary to the reasoning and spirit of this Court's decision in the case of *Sorrells* v. *United States,* 287 U. S. 435, and the case of *United States* v. *Abdallah,* 149 Fed. (2) 219 relied on by the Circuit Court of Appeals as authority, is in principle contrary to the *Strader* case *supra* and others.

2. This Court has never decided a case involving alleged entrapment of a physician, previously innocent, for violating the Narcotic Act in issuing prescriptions where the government agents or government employees themselves alone did the necessary acts to complete the crime by having the prescriptions filled, as in the facts in this case, nor do any of the cases decided by the courts which involve this question—this case, therefore, presents a novel question of great importance in the enforcement of the Narcotic law here involved.

3. The Circuit Court of Appeals in affirming the conviction herein has misconstrued the decisions in the case of the *United States* v. *Lindenfield*, 142 Fed. (2) 829, decided by the Circuit Court of Appeals for the Second Circuit and the case of the *United States* v. *Abdallah*, 149 Fed. (2) 219, decided by the same Circuit Court of Appeals, principally relied as authority. The Circuit Court of Appeals in this case held that the facts were similar to those in the above cases, whereas they were mutually different in that in both of the above cases the "government agents" referred to were not shown to have been persons on the payroll and in the employ of the United States but only informers, or detectives or addicts.

4. The Circuit Court of Appeals for the Third Circuit in affirming conviction herein disregarded substantial prejudicial errors in that it disregarded the fact that testimony relating to other prescriptions and testimony relating thereto remained in the record, although no offense was alleged or charged in respect to such prescriptions and also disregarded the action of the United States District Court in refusing to grant a new trial based upon the conduct of the juror's wife.

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit commanding that Court to certify and to send to this Court for its review and determination on a date certain to be therein named the full and complete transcript of the proceedings of said Court herein, entitled *United States of America* v. *Leopold William Brandenburg,* Docket No. 9268, and that the judgment of said Court be reviewed by this Court and for such other relief as to this Court may seem proper.

FREDERIC M. P. PEARSE,
SAMUEL L. HIRSCHBERG,
MARSHALL R. DIGGS,
CHARLES M. TRAMMELL,
412 Colorado Bldg.,
Washington, D. C.

Dated this 30 day of July, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 237

LEOPOLD WILLIAM BRANDENBURG,
Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Indictment

The petitioner was found not guilty on the first count in the indictment. On counts two through eleven petitioner was found guilty. All the counts are similar except as to name of person in whose name the prescription was issued, the amount of morphine sulphate included in the prescription and the disease for which subscribed. The indictment alleges that Leopold William Brandenburg, a physician who had duly registered and paid the special tax as required by the Harrison Narcotic Act on the 8th of August in the year 1944 at Union City in the County of Hudson, in the State and District of New Jersey, did unlawfully, knowingly, feloniously and willingly sell, barter, ex-

change and give away to one James B. Humphries a quantity to wit: 20½ grain hypo tablets of morphine sulphate not in pursuance of any written order of the said James B. Humphries on a form issued in blank for that purpose by the Commissioner of Internal Revenue and not in good faith and in the course of his professional practice only, by means of a written order of said defendant in the form of a prescription, which was signed by the said defendant which called for the delivery to said James B. Humphries of the amount of drug above described and that the defendant intended that the said James B. Humphries should obtain the said drug from a druggist upon and by means of the said prescription, and that the said James B. Humphries thereafter did obtain upon and by means of said prescription drugs of the amount and kind above described, that the said James B. Humphries did not then and there require the administration of morphine sulphate by reason of any disease and that the defendant did not sell, barter, exchange and give away any of the said drugs for the purpose of treating any disease, but that the said drugs, sold, bartered, exchanged or given away by the defendant were in the form in which such drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefore, and were adopted to such consumption and were so sold, bartered and exchanged and given away by the said defendant with the intent that the said drugs should be used for such purpose. The above is the substance of count two. Counts three, four, five and six are identical, except for the quantities of drug. Counts seven, eight, nine, ten and eleven are identical, except for the name of Ralph VanPelt used as the person to whom the prescription was given instead of James B. Humphries, the amounts of the morphine sulphate are different and the disease for which prescribed is different as appears on the prescriptions.

Statutes Involved

Title 26 U. S. C. A., Sections 2553 and 2554, Known as the Harrison Anti Narcotic Act

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax. As amended July 1, 1944, c. 377, sec. 2, 58 Stat. 721.

"(b) Exceptions in case of registered practitioners. The provisions of subsection (a) shall not apply—

"(1) Prescriptions. To any person having in his or her possession any of the drugs mentioned in section 2550 (a) which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3221; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or

"(2) Dispensations direct to patients. To the dispensing or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient

for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dispensed, administered, distributed, or given away."

"(a) General requirement. It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * * * *

"(c) Other exceptions. Nothing contained in this section, section 2563, or section 2564 shall apply—

"(1) Use of drugs in professional practice. To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556.

"(2) Prescriptions. To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221; Provided, however, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: And provided further,

That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556."

Statement of Proceedings

The defendant was first tried on the indictment in April, 1945, was convicted and sentenced to serve three years in a Federal Penitentiary. He took an appeal to the Circuit Court of Appeals, which Court filed its opinion in April, 1946 reversing the judgment below and remanding the case for a new trial (155 Fed. (2d) 110). The case was retried in October, 1946 and the defendant was acquitted on the first count in the indictment and convicted on the remaining ten. He was subsequently sentenced to serve five years in a Federal Penitentiary and has appealed to this Court.

Résumé of the Facts

The defendant, Dr. Brandenburg, is a general practitioner of medicine and surgery at Union City, Hudson County, New Jersey, of 33 years standing (R. 287). There was no evidence tending to show that he made a practice of issuing prescriptions for narcotics to those addicted to their use.

It appears that one Humphries was a former patient of a well known physician in Hudson County, New Jersey (Dr. Brady) and that Dr. Brady was ill, and as Dr. Brandenburg was taking care of Dr. Brady's patients during his illness, Humphries was sent or went to Dr. Brandenburg and complained to him that he was suffering from gall stones (R. 25, 26). This first visit to Dr. Brandenburg was in the middle of April, 1944 (R. 25). On that first occasion in April, 1944, Dr. Brandenburg gave Humphries a prescription for 100 ¼ grains of morphine sulphate (R. 26, 446 Ex. G-1). After the prescription had been given.

Humphries presented it to a drugstore in Secaucus (R. 28), and the druggist informed him that he could not fill the prescription. The druggist telephoned to Dr. Brandenburg and as a result Humphries went back to Dr. Brandenburg's office (R. 28) and Dr. Brandenburg then gave him, Humphries, two prescriptions for 50 ¼ grains each of morphine sulphate (R. 29). These are not in evidence.

Humphries retained the first prescription for 100 ¼ grains (Ex. G-1) and under the supervision of a narcotic agent filled the prescription on May 13th, 1944 (Ex. G-2), a month after it was issued.

Humphries never told Dr. Brandenburg that he was addicted to the use of drugs (R. 63), although he testified that he had been so addicted for a period of about five years (R. 23).

Humphries had been arrested in February, 1944 for disorderly conduct and was locked up in the Hudson County Jail. Through the auspices of Mr. Belmont, a narcotic agent, he was released and became an informer for the Government (R. 73), and continued to act as such. It also appears that Humphries was convicted in January, 1945 (just before the first trial of this case), in the Middlesex County Court of Quarter Sessions in New Jersey, of attempting to obtain narcotic drugs with a forged prescription (R. 82). When Humphries first came to see Dr. Brandenburg and told him that he was suffering from a gall bladder condition, the doctor told him that if he was suffering he ought to be operated on (R. 78).

During July, August and September of 1944, Humphries, on various pretexts, secured morphine sulphate from Dr. Brandenburg. Appended to the record at page 446 is a list of these prescriptions, some of which were obtained under the supervision of the narcotic agents and filled by Humphries at a drugstore under their supervision, and the mor-

phine turned over to them. He testified both on direct and cross-examination that he paid $5.00 every time he called upon the doctor. Sometimes he received one prescription for narcotics and sometimes two at the same time, although the office fee was always $5.00 (R. 37).

In the late summer of 1944 the narcotic agents planted another one of their number on the doctor, a man by the name of VanPelt. Humphries introduced him to the doctor as his brother-in-law, and informed the doctor that he was suffering from the result of tuberculosis and a collapsed lung and required morphine to alleviate pain (R. 111). VanPelt secured four or five prescriptions from the doctor in August and September, 1944 for 25 ¼ grains in each prescription. Both Humphries and VanPelt testified that they told the doctor what their alleged ailments were. The doctor relied upon their statements and according to their testimony made no physical examination before issuing the prescriptions (R. 54, 55, 111). VanPelt testified that on each visit to the doctor he paid him $3.00 except on the last occasion when he gave the doctor $6.00 in marked money (R. 125). At the time that VanPelt was introduced to the doctor by Humphries the doctor was also led to believe that VanPelt had likewise been a patient of Dr. Brady (R. 118, 145). Humphries, during the time when he was securing prescriptions from Dr. Brandenburg, was on the Government payroll and then was getting about $150.00 a month for securing evidence in narcotic cases. According to his testimony he had ceased using drugs for a period of approximately 18 months preceding the last trial of this case which started on November 8th, 1946.

As we have heretofore shown, Humphries was locked up in the Hudson County Jail in February, but secured his release through Mr. Belmont, an employee of the Bureau of Narcotics of the Treasury Department of the United

States. Apparently from his testimony and from the testimony of the agent (Mr. Belmont), he was not acting as an informer when he first called upon Dr. Brandenburg in April, 1944 and received Exhibit G-1 and secured the substitution of two other prescriptions about the same time in place of it. According to Humphries (R. 73) and Belmont (R. 148), on May 11th, 1944 Humphries turned over to Belmont this prescription for 100 ¼-grains of morphine sulphate (Ex. G-1), which he had secured from Dr. Brandenburg and had not returned to him. Belmont then consulted with his District Supervisor in New York and received permission (as he puts it) "to begin a criminal investigation of the practice, the narcotic practice of Dr. Brandenburg" (R. 149) whatever that may mean. The first step that he took was to have Humphries go to a drugstore and have this prescription filled on May 13th, 1944. At that time Humphries was employed and compensation was paid him by the United States Government to work with narcotic agents. Apparently the agents permitted Humphries to secure prescriptions from Dr. Brandenburg during the month of July and the first part of August, fill them at drugstores and use them at will. It was not until August 8th, 1944 that VanPelt was called in to secure from Dr. Brandenburg prescriptions by the deceit which he and Humphries practiced upon the doctor, and the prescription of August 8th and those secured subsequently by either VanPelt or Humphries are the prescriptions referred to in Counts II to XI in the indictment, that is, from August 8th, 1944 to September 12th, 1944.

It may be noted here that the jury acquitted the doctor on the first count in the indictment, which refers to Exhibit G-1 secured from the doctor in April, 1944 and filled under the supervision of the agent on May 12th, 1944. It was on September 12th, 1944 that VanPelt gave the doctor $6.00 in marked bills and his arrest ensued (R. 154).

After the doctor was arrested he was then interviewed by agent Belmont and another agent who inquired of him as to whether or not he was prescribing narcotics to any other patients and he gave them the names of a Mrs. Wempler and a Mrs. Muller, and also told them that Humphries was suffering from gall bladder trouble and that he was intending to operate on him as soon as he came back from a trip at sea. Humphries was a merchant seaman, and, incidentally, had told the doctor that VanPelt was his brother-in-law and was a steward on board ship, which was corroborated by VanPelt himself when he called on the doctor (R. 145). VanPelt also says that he told the doctor that he was addicted to use of morphine because of his alleged ailment. The Court permitted the conversation to stand between the doctor and the agents concerning Mrs. Wempler and Mrs. Muller, but the United States Attorney withdrew the offer to admit in evidence the prescriptions that the doctor had given for Mrs. Wempler and Mrs. Muller. Therefore, the so-called "criminal investigation" of Dr. Brandenburg consisted of permitting Dr. Brandenburg to prescribe for Humphries during July and the first part of August without any warning to him as to what they knew about Humphries, and then from August 8th to September 12th furnishing Humphries with funds to fill the prescriptions secured by him from the doctor at the drugstores and by deceiving him into believing that VanPelt was suffering from a disease which required narcotics to relieve pain and filling the prescriptions issued to him at drugstores at government expense, both Humphries and VanPelt being at the time paid employees of the United States. Previous to any of the alleged offenses on which petitioner was convicted (counts two to eleven of indictment), there was one offense charged but on this he was found not guilty.

ARGUMENT

Point 1

The Circuit Court of Appeals erred in holding that the question of entrapment as presented in this case, where there was no dispute as to the facts on the point, was a matter to be submitted to the jury and in so holding the decision is contrary to opinions of other Circuit Court of Appeals decisions.

In all decided cases, which counsel have been able to locate involving the question of entrapment of a physician in narcotic cases, there has been evidence of a prior commission of an offense against the narcotic laws or a reasonable cause to believe that the defendant had committed such an offense or had the intent or willingness to do so. In this case the only prior alleged offense was the one charged in count one of the indictment on which accused went to trial. On this count, which alleged that the accused unlawfully gave a prescription to Humphries, accused was found not guilty. This can only mean that the jury believed the prescription was given in good faith in the regular practice of accused's profession of medicine, and that the relationship of doctor and patient was established. There was thus no previous offense or any reasonable cause to suspect accused of any wrongful act or intent. There is no conflict in the evidence as to this and thus no basis for entrapment.

In the case of *Sorrells* v. *United States,* 287 U. S. 434, which is a leading case on the subject of the entrapment. That case involved a violation of the Prohibition Act. This Court said: "It is clear that the evidence was sufficient to warrant a finding that the act upon which the defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it, but was an industrious,

law-abiding citizen and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded to take advantage of the sentiment aroused by reminiscence of their experiences as companions in arms in World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime and not for the making of criminals deserves the severest condemnation * * *." The Court also stated: "We are of the opinion upon the evidence produced in the instant case that the defense of entrapment was available, and that the trial court was in error in holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury." The language of this Court in the above case indicates that the defense of entrapment was fully complete, that all elements of entrapment were present. This Court examined the evidence in the case and so held. The most that the trial court could have done in the re-trial of that case was to charge the jury, as this Court had stated. On this point it is contended that the Circuit Court of Appeals for the Sixth Circuit in the case of *Morei* v. *United States,* 127 Fed. (2) 827, correctly interpreted this Court's decision in the *Sorrells* case. That decision being contrary to the decision of the Circuit Court of Appeals, which is sought to be reviewed. In the *Sorrells* case, however, this Court stated: "The Federal Courts, in sustaining the defense in such circumstances (entrapment cases), have proceeded in the view that the defendant is not guilty * * *." The Court further stated: "Fundamentally the question is whether the defense (entrapment) takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose. * * *" Where the facts as to entrapment are not in dispute, that

entrapment is clearly established, there is no question on this issue to be submitted to the jury. It is only in cases where the Court has doubt or where there is conflicting testimony on the subject where the question should be referred to the jury. This had been held in a long line of Federal Court decisions referred to by the Supreme Court in the *Sorrells* case. See the case of *O'Brien* v. *United States,* 51 Fed. (2) 674, decided by the Circuit Court of Appeals of the Seventh Circuit and cases therein cited. This Court, in the *Sorrells case,* expressed no disapproval of that line of cases.

In the case of *United States* v. *Echols,* 253 Fed. 862, upon a tender of a plea of guilty, the Court of its own motion examined the prisoner and the officers concerned with the arrest and being satisfied that these officers had instigated the crime declared that public policy required that the case be dismissed. In *United States* v. *Healey,* 202 Fed. 349, a judgment and sentence was set aside and the defendant discharged upon the Court's ascertaining that the conviction was procured by entrapment. In the case of *Strader* v. *United States,* 72 Fed. (2) 589, the Court of Appeals of the Tenth Circuit on the subject of entrapment said: "*such a question may be investigated on the Court's own motion at any stage of the proceedings because proof of its existence required that the prosecution be ended as it is against public policy to convict one upon proof obtained in that manner and if the Court is in doubt, the issue may be submitted to the jury*" and cited the case of *Sorrells* v. *United States,* above referred to as authority for that statement. (Italics added.) That Court interpreted the Sorrells decision only to mean that in case of doubt on the subject of entrapment that the matter should be referred to the jury. In the case of *Wall* v. *United States,* Circuit Court of Appeals for the Fifth Circuit, 65 Fed. (2) 993, interpreted the

decision of this Court in the *Sorrells* case to the effect stating in referring to entrapment: "However, on the other hand, if they (government agents) took advantage of the sympathy appellant would naturally have for Isabel Knowles because of their former illicit intimate relations and thereby induced appellant to put the agents in touch with Zarata to pander to her craving for morphine and he was acting solely in the belief that by doing so he would alleviate her suffering and he was in no other way interested in the unlawful sale, this would amount to entrapment and the conviction could not be sustained. Citing the *Sorrells* case by this Court as authority for that statement." The Court further added that the question (of entrapment) presented on conflicting evidence was for the jury. The above cited cases interpreting the *Sorrells* case are directly in conflict with the decision of the Circuit Court of Appeals, which is sought to be reviewed in this case.

In the case of *Gunning* v. *Cooley,* decided by this Court, 281 U. S. 90, the Court stated: "A mere scintilla of evidence is not enough to require the submission of an issue to the Jury." The same doctrine is announced in *Leslie* v. *United States,* 43 Fed. (2) 288.

As there was no evidence whatever to rebut the evidence of entrapment in this case as is established by uncontroverted facts the matter should not have been referred to the jury on the question of entrapment. The Court should have ordered the acquittal of the accused. However, in the case of *Bishop* v. *United States,* 16 Fed. (2) 410, the Court stated that where the evidence in the case is as consistent with innocence as with guilt, conviction cannot be sustained, citing other cases. It is clear from the decisions, if a person previously innocent is entrapped by government agents into committing offense that he is not guilty.

In all of the cases relied on by the Circuit Court of Ap-

peals decision which is sought to be reviewed, which involved entrapment of physicians for giving prescriptions in narcotic cases, there was either evidence of the previous guilt of the accused or reasonable grounds for suspicion of previous violation of the law or intent or willingness to violate the law. There is a necessary difference between selling liquor in the prohibition cases and prescribing narcotics by a physician in the medical practice, where the physician is lawfully permitted to prescribe for patients. See *U. S.* v. *Becker*, 62 Fed. (2) 100; *U. S.* v. *Abdallah*, 149 Fed. (2) 292; *Fish* v. *U. S.*, 215 Fed. 544; *Nigro* v. *U. S.*, 117 Fed. 2624.

POINT 2

Did the Circuit Court of Appeals err in affirming the judgment of conviction where the evidence discloses without dispute that the petitioner, a practicing physician, issued prescriptions for morphine sulphate to persons in the employ of the United States Government seeking to entrap him and where the prescriptions were filled by such Government agents for drugs purchased by money furnished by the United States?

The undisputed facts are that all the prescriptions which were obtained from the petitioner under Counts II to XI (Count I having been eliminated by the verdict of Jury) were issued to Government agents (Humphries and Van Pelt both being in Government employ at the time) seeking to entrap the petitioner and were filled by druggists on presentation by the said Government agents and employees at Government expense.

This state of facts presents an issue to this Court not heretofore decided by it. In none of the decided cases did the undisputed facts present a case where persons in the

employ of the Government by means of entrapping obtained prescriptions from a physician not theretofore ever charged with an offense of any kind and against whom there never was a suspicion of wrong doing and where such Government employees, with Government money, had these prescriptions filled. In all of the other decided cases involving entrapment of a physician for violation of the Narcotic Act in giving prescriptions the so-called addicts, not in the employ of the United States Government, had the prescriptions obtained by them filled, although in some cases they were filled under supervision of Government agents.

In the cases of *U. S.* v. *Lindenfield* 127 Fed. (2) 829 and *U. S.* v. *Abdallah* 149 Fed. (2) 219 and other cases relied on by the Circuit Court of Appeals which is sought to be reviewed here the facts were that prescriptions were obtained from the physician by decoys and informers (not persons in the employ of the U. S. Government and not on the Government pay roll) and they were filled by pharmacist on presentation by the decoy or informer under supervision of a Government agent. In the *Abdallah,* the Court stated that the crucial act was committed when the prescription was issued *although the crime* is not committed until prescriptions are filled. On the question of the defense that the prescriptions were filled by a decoy or detective and that their acts cannot be imputed to the accused physician, the Court said "We need not stop to consider how far this principle may be soundly pressed." In any event the *Abdallah* case is contrary in principle to the case of *Strader* v. *U. S.,* 72 Fed. (2) 589.

In the case of *Wall* v. *U. S.,* the Circuit Court of Appeals for the 5th Circuit June 27, 1933, 65 Fed. (2) 933, the Court stated that if the Government agents suspected defendant of unlawfully dealing in narcotics they were authorized to take steps to purchase a quantity from him and that al-

though the "devise employed was exceedingly indecent and beneath the dignity of the United States," the transaction would be sufficient to support conviction. In this case, however, it appeared that there was a sale of narcotics directly by the physician and thus the offense consummated and not through a prescription, where there is no offense until it is filled.

In criminal offenses committed pursuant to traps set either by government informers or government enforcement agents, the prosecution must fail if any act necessary to complete the crime was performed by the government agent. In other words, Dr. Brandenburg committed no crime by the mere issuance of prescriptions for narcotics. He made no sale of narcotics as "sale" is defined in the statute. A further act was necessary in order to complete the offense and that was the filling of the prescriptions by a druggist and the delivery of the narcotics for a price. That was the final act necessary to complete the offense and the prosecution must fail if any act necessary to complete the crime was performed by the government informer or the government agent.

In support of this view we quote from the following cases:

In *People* v. *Lansit,* 70 Cal. App. 498, at page 509, the Court stated:

> "It is of course necessary that the defendant should have directly participated in so much of the entire transaction that the acts which he himself personally committed would alone be sufficient to make out a complete offense against the law; for no act done by his feigned accomplice may be imputed to him, and, if, in order to constitute an offense, it is necessary that something done by the supposed confederate should be imputed to the accused, then the prosecution will fail."

In *Dalton* v. *The State,* 113 Ga. 1037, the Court stated:

> "When one is informed that another intends to commit an offense against him on his property, the law permits him to afford opportunities for its commission and lay traps which may result in the detection of the offender * * *. In such a case, however, it must appear that the person charged with the offense did himself everything necessary to make out a complete offense against the law. Nothing that was done by the person present with the knowledge and consent of the victim will be imputed to the accused; and if, in order to constitute the offense, it is necessary that something done by such person be imputed to the accused then the prosecution will fail."

In *State* v. *Decker,* 321 Mo. 1163, 1169, 1170, the Court stated:

> "Also, with respect to entrapment, it must appear that defendant on trial himself did everything necessary to show a complete offense against the law. Even if done with the knowledge and consent of the defendant, nothing may be imputed to him that was done by the entrapper; and if, in order to constitute the crime, it was necessary to impute something done by the entrapper to him, then the prosecution fails."

In *Williams* v. *Georgia,* 55 Ga. 391, 395, the Court stated:

> "It seems to be settled law that traps may be set to catch the guilty and the business of trapping has, with the sanction of courts, been carried pretty far. Opportunity to commit crime, may, by design, still be * * *. But can the owner directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent, to whom he has entrusted the conduct of the transaction, puts his own hands into the corpus delicti, and assists the accused to perform one or more acts necessary to constitute

the offense? Should not the owner and agent, after making everything ready and easy, wait passively and let the would-be criminal perpetrate the offense for himself in each and every essential part of it? It would seem to us that this is a safer law, as well as the sounder morality, and we think it accords with the authorities."

The same principle is also pronounced in Corpus Juris as follows:

In 22 Corpus Juris Secundum, 104 Criminal Law, Section 45(b), the text states:

> "To obviate the defense of entrapment, accused must have himself done everything essential to make out a complete offense against the law. The defense is available if the entrapping officer or person performs any of such essential acts. Nothing done by the entrapping person, who is present with the knowledge and consent of the victim will be imputed to accused and the prosecution will fail if it is necessary that something done by such person should be imputed to accused in order to constitute the offense."

In support of the same view we also quote from the following case:

In *DeMayo* v. *United States,* 32 Fed. (2d) 472, the Court stated at page 474:

> "As to the three remaining overt acts, we are of the opinion that government officers should not so far participate as themselves to perform unaided by any of the conspirators the crucial act of introducing the liquor into the forbidden territory. They may properly afford opportunity to those suspected of crime to commit the original offense. They may be participants to a certain extent, but they, themselves, may not unaided, as in this case, do the very overt act which is essential to the consummation of the offense charged."

A striking example in support of our argument are the incidents which took place on September 12th when the two informers, Humphries and Van Pelt, secured prescriptions from Dr. Brandenburg. After they were procured and before the prescriptions were filled the doctor was arrested (R. 154).

We respectfully submit that the extent to which the laying of traps has been permitted for the purpose of law enforcement merely contemplates affording, to one who has a criminal inclination, an opportunity to commit the crime. In this case there is no testimony of any previous conviction of any offense or any reasonable ground for suspicion of an intent or willingness to commit any unlawful act. Certainly, it would be contrary to public policy to permit the enlargement of the trap to the extent that the law enforcement agencies shall be allowed actually to procure the completion of an offense which otherwise may never have been completed. For example, an addict who obtains a narcotic prescription from a physician (if not a Government informer directed by the Government to have the same filled) may, for many reasons, never have the prescription filled, in which event the offense charged herein would not be completed and the physician would not be liable. However, in this case, if the Government's filling of the prescriptions be attributed to the doctor, then it must be said that the Government had it entirely within its option, after the issuance of the prescriptions, to determine whether the doctor should remain innocent by leaving the prescriptions unfilled, or attempt to constitute him a criminal by causing the narcotics to be procured thereon.

> "The accused may not be deprived of that period of immunity by the act of a government officer who is not in law a co-conspirator" (*DeMayo* v. *U. S., supra*).

The nature and quality of appellant's conduct may not be deemed to have acquired criminality by virtue of the government's subsequent acts in obtaining the narcotic.

Prior to the decision of the Supreme Court in *U. S.* v. *Jin Fuey Moy,* 254 U. S. 189, it appeared generally settled that the mere issuance of a prescription for narcotics to a drug addict did not constitute a "sale," regardless of the question as to the good faith of the physician in so prescribing, unless the facts established a prearrangement or conspiracy between the physician and the druggist who actually dispensed the narcotics (*DiPreta* v. *U. S.* (2nd C.), 270 Fed. 73; *Foreman* v. *U. S.* (4th C.), 255 Fed. 621; *Doremus* v. *U. S.* (5th C.), 262 Fed. 849; *Jackson* v. *U. S.* (8th C.), 297 Fed. 20; *Manning* v. *Biddle* (8th C.), 14 Fed. (2d) 518).

In the *Jin Fuey Moy* case the facts (p. 193) clearly established a prearrangement to sell narcotics between the physician and the druggist, whereunder drug addicts who applied to the physician were given a prescription and sent to the particular druggist who dispensed the same, and conversely addicts who applied to the druggist were sent to the physician for the prescriptions upon which the druggist purported to dispense the narcotics. Thus, it was manifest that there was a conspiracy between the druggist and the physician to bring about the sale, and by issuing the prescription the physician deliberately and knowingly aided and abetted his confederate, the druggist, in making the prohibited sale, which at common law would constitute the physician an accessory. The ruling in the *Jin Fuey Moy* case that under Section 332 of the Criminal Code (18 U. S. C. A. 550) the physician was responsible as a principal for the violation of the statute prohibiting the sale, necessarily would appear to have been based upon the foregoing facts showing a pre-arrangement or conspiracy (p. 192). It would appear from the words of qualification on page 192

of the *Jin Fuey Moy* decision, as well as the general context, that the Supreme Court based its ruling that the physician was liable for the prohibited sale upon the fact that the sale in that case was procured as the result, not merely of the issuance of the prescription, but of the conspiracy between the physician and the druggist pursuant to which it was issued.

Morei v. *U. S.*, 127 F. (2d) 827, clearly shows that Section 332 of the Criminal Code (under which the physician was held to be a principal in the *Jin Fuey Moy* case) (18 U. S. C. A. 550) can have no application unless there is a conspiracy or "community of unlawful intention" (p. 831) between the physician and the druggist. The Circuit Court for the Sixth Circuit there held that in order to constitute the defendant physician a principal, it must be established that by common law rules must be an accessory before the fact. The Court there pointed out (p. 831) that Section 332 (18 U. S. C. A. 550) did not create a "new crime therefore unknown," but merely enabled the Government to prosecute an accessory before the fact as a principal; and that to be an accessory before the fact, it must be shown that there was a prearrangement between the physician and the actual seller to commit the prohibited act.

As the Court said in the *Morei* case, 127 F. (2d) 827 at 831:

> "Strictly speaking, in order to constitute one an accessory before the fact, there must exist a community of unlawful intention between him and the perpetrator of the crime. The concept of an accessory before the fact presupposed a prearrangement to do the act (See West *v.* State, 25 Ala, App. 492, 149 So. 354); and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal. Whitt *v.* Commonwealth, 221 Ky. 490, 298 S. W. 1101.

> If Dr. Platt is guilty of the offense charged, it is because he was an aider and abettor, or an accessory before the fact. It is true that, since enactment of statutes making aiders and abettors, and accessories, liable as principals, many courts have indiscriminately referred to accessories as aiders and abettors. In this case, such a matter is unimportant. Thus, it was said in Parisi *v.* United States, 2 Cir. 279 F. 253, that it is not necessary that one who aids and abets the commission of a crime, need be present when the crime is commited; but this is not entirely accurate in the strict sense of the legal definitions. In Jin Fuey Moy *v.* United States, 254 U. S. 189, 41 S. Ct. 98, 65 L. Ed. 214, cited in support of the statement made in the foregoing case, it was merely said that one may take a principal part in a prohibited sale of narcotics by unlawfully issuing a prescription."

We believe that the Morei decision properly construed the *Jin Fuey Moy* case as involving "parties, who, under common law would be liable as aiders and abettors or accessories," thus indicating that that Circuit Court of Appeals regarded the Jin Fuey Moy ruling as based upon and limited to facts showing the physician to be acting under a prearrangement with the druggist.

To hold otherwise would be to create a heretofore unknown criminal liability, and one peculiar to the Harrison Anti-Narcotic Act, rendering liable as principals those who at common law would not constitute even accessories, thereby convicting physicians of "aiding and abetting sales" by druggist unknown to the physician.

This argument is borne out by the language of the statute itself. Section 2553(a) provides that "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs * * * except in the original stamped package * * *."

In Section 2553(b) persons who have in their possession

any of the drugs which have been obtained from a registered dealer in pursuance of a prescription issued by a physician where the bottle or container in which the drug may be put up by the dealer upon the prescription there is the name, etc., of the druggist and the name and address of the patient and the registry number of the person writing the prescription.

In other words, the meaning of the words, "sell, dispense, or distribute" relate to the delivery of the drugs themselves or the purchase of the drugs themselves not acquired through prescriptions written for legitimate medical uses.

So far the provisions of the statute have nothing to do with any action on the part of the physician.

The remaining provisions of Section 2553(b)(2) prohibit the dispensing or administration, or giving away of the drugs themselves by a physician except in the course of his professional practice, and dispensed or administered for legitimate medical purposes.

Section 2554 forbids the selling, bartering, exchanging or giving away of any of the drugs except in pursuance of a written order of the person to whom such article is sold, bartered or exchanged or given, on a form issued in blank for that purpose by the Secretary of the Treasury. This provision has nothing to do with prescriptions by physicians.

Then there is the exception under Section 2554 which permits a physician to dispense or distribute drugs in the course of his professional practice. Here again the statute relates to the actual dispensing or distribution of the drugs themselves.

A further exception under Section 2554 relates to the actual sale, dispensing or distribution of the drugs by a dealer to a consumer in pursuance of a written prescription by a physician, provided the prescription shall bear the

date of the day it was issued and shall be signed by the physician who issued the same. Here again this exception relates to the actual sale, dispensing or distribution of the drugs themselves.

This construction of the statute is supported by the case of *United States* v. *Reynolds,* 244 Fed. 991, wherein the Court said:

> "The Harrison Law • • • required nothing of physicians issuing prescriptions for opium save that they, the physicians, be registered and the prescriptions be signed by the physicians and dated as of the day of such signing. By giving prescription, the physician does not 'dispense' opium, in the sense of the word as used in the said law. As therein used, 'dispense' relates to actual delivery of the drug by the physician to the patient, from the former's office supply, generally, though not excluding other actual delivery. As defendant is not charged with having failed to so register or to so sign the prescription, he is not accused of any offense or violation of said law."

The construction of the statute is also further supported by the case of *Foreman* v. *United States,* 255 Fed. 622, wherein the Court said:

> "There was no evidence that defendant was interested in the business of any of the druggists, or had any arrangement to share the profits of the sales with them, or that he was agent for any druggist, or that he even knew where the prescriptions were to be carried. What the statute forbids is sale, barter, exchange, or gift, including such distribution and dispensing by a physician not in the course of his practice as would amount to participation in a sale, barter, exchange, or gift. The mere issuance of a prescription by a physician to be filled by any druggist, without participation by the physician in the sale made under it, would not be a sale as charged in the indictment, or such distribution or dispensing as amounts to a sale."

The foregoing decisions clearly indicate that the word "dispense" means the actual delivery of the drug and not any written order or prescription for it. The word "distribute" is defined as follows in the dictionaries and *Corpus Juris:*

> Webster: "to deal out or divide; allot; apportion; arrange according to classification; dispose of separately; separate and return (as types) to the respective cases."
>
> Funk & Wagnalls: "to divide among a number, apportion, share."
>
> *Corpus Juris:* "to divide among several or many; to deal out; to allot."

In addition, may we say and we urge, that the whole case is barren of any proof whatsoever by those skilled in the administration of narcotics for the relief of pain that the amount of morphine prescribed by the defendant and the frequency of its use was in excess of that which would have been prescribed by other physicians acting in good faith and in the legitimate practice of medicine. In the absence of such proof the prescriptions should not have been admitted in evidence for the jury to speculate as to whether or not the doctor was within the law when he issued them and as to whether or not he acted in good faith in so doing.

The only medical testimony introduced by the government concerns the casual examination of the two informers which is set forth in and argued under Point V.

The record in the instant case shows conclusively that the doctor in prescribing for his patient, did not base his fee either on the quantity prescribed or the number of prescriptions issued. As we have heretofore shown, Humphries testified that the office fee was $5.00. VanPelt says he paid $3.00. The doctor testified it was only $2.00. It was only on September 12 that VanPelt left $6.00 with the doctor when he received two prescriptions. This was

in marked money. The doctor was immediately thereafter arrested.

In the cases that came before the Supreme Court and where the conviction was upheld (by a divided court), the fee of the physician was based upon the amount of narcotics prescribed or dispensed by the physician in his office. In those cases it was clearly indicated that the doctor was selling rather than prescribing for a patient. The contrary is the proven fact in the instant case. This is another reason why the prescriptions introduced should not have been admitted in evidence for the jury to speculate as to whether or not they were properly issued or secured as the result of a trap set against the defendant.

For these reasons we urge that the trial court erred in admitting the exhibits in evidence in support of proof of the charges in the indictment, and the Circuit Court of Appeals erred in failing to reverse that decision.

Point III

Did the Circuit Court of Appeals err in failing to rule as a matter of law that no foundation had been laid by the use of entrapment methods?

Since the evidence is beyond dispute that the accused had not been convicted of a previous offense against the Narcotic Law or of any offense, nor was there evidence of a reasonable ground for suspicion of an intent or willingness to commit an offense previous to the entrapment methods used in this case, there was no foundation or authority to use methods which instigated and induced whatever offense the accused committed,—See authorities cited in Points I and II,—and the trial court should have directed acquittal. The Circuit Court of Appeals erred in failing to reverse the District Court for such failure.

Point IV

The verdict of the jury was contrary to the charge of the Court based upon the facts proven on the trial of the case, and the Court should have set aside the verdict.

On the question of entrapment, the Court charged the jury as follows (R. 377, 378):

> "Speaking of the fact that Humphries was given the money by the Government leads me to the question of what is known in law as entrapment. No government agency has the right to induce an innocent person to commit a crime for the purpose of arresting that person for its commission. No government agency or operative has the right to sow in the mind of any person the intent to commit a crime and to encourage the commission of that crime. That is an obscene thing.
>
> "Entrapment, as I have spoken of it, is incitement, inducement, instigation, or luring of the accused into committing an offense which he otherwise would not have committed and had no intention of committing.
>
> "There is a distinction, however, between the inducement of an innocent person to do an unlawful act, and the attempt to catch a person who already has the intent and design to commit a criminal offense and who, in fact, does commit the essential act constituting it, merely because an officer of the law in his attempt to secure evidence against such person affords him an opportunity to commit the criminal act or purposely places facilities in his way or possession, and encourages him in the perpetration thereof.
>
> "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by someone who would not have perpetrated it except for the trickery, persuasion or fraud of the officer.
>
> "To determine in this case that there was entrapment, you must decide from the evidence whether the purpose of the agent was to induce or solicit the

commission of crime or to ascertain if the defendant was already engaged in an unlawful business or in criminal activity. Entrapment does not exist where an opportunity is merely afforded for a person to exercise an already existent intent to commit crime."

POINT V

The methods employed by the Government agents to entrap the defendant were repugnant to justice and the Court should have granted the motion for judgment of acquittal at the end of the Government's case instead of leaving the question of entrapment to the Jury.

In the interest of law enforcement Government officers are permitted to employ stratagems or deceptions which seek to test or detect any criminal tendencies of the suspect (*U. S.* v. *Wray,* 8 Fed. (2d) 429, 420). Thus the officer may pretend that he is an addict craving drugs or that he requires the drugs for illegal use. Such stratagems serve a proper purpose since, by their very nature, they immediately put the suspect on notice that he is being given an opportunity to participate in a crime. Where, however, the enforcement officer employs a deception calculated to induce the suspect to believe that he is not committing or being solicited to commit a crime, the conditions of the legal trap are non-existent; to the contrary the trap becomes one likely to ensnare the innocent and is repugnant to law and public policy.

Attention is again directed to the case of *Morei* v. *United States,* 127 Fed. (2d) 827, where the subject of entrapment is discussed in detail. The facts in that case are comparable with the facts in the instant case and support our argument.

As we have heretofore shown, Humphries never disclosed to the doctor that he was a drug addict. From first to last he represented to the doctor that he was suffering from gall

bladder trouble or the pains incident thereto. The agent VanPelt practiced the same kind of deception on the doctor so far as his alleged suffering is concerned, which he said was caused by pleural pains, the result of a lung collapsed because of a previous consumptive condition (R. 136). There can be no question that these various statements were made for the purpose of deceiving the doctor into thinking that he was prescribing in good faith to alleviate pain and suffering in both cases; in other words to make the doctor believe that he was not committing a crime in issuing the prescriptions. Certainly that was not a method to detect or test criminal tendencies on his part, and there is no evidence to show that such criminal tendencies were suspected by the agents of the Government prior to the time that he prescribed for Humphries. The Narcotic Bureau knew or should have known of the deception that Humphries was employing and of course, as we have said before, VanPelt deliberately deceived the doctor either by what he said to him himself, or by what was said to the doctor by Humphries concerning VanPelt's alleged condition. VanPelt was present in the Supervisor's Office when further plans were made to entrap the doctor (R. 129). This arrangement was made on August 22nd. VanPelt was supposed to be "set in," which apparently is the language of the street when narcotic agents set out to entrap someone (R. 131).

The Court submitted this question of entrapment to the jury after having denied the motion for a judgment of acquittal on the ground of entrapment. We urge that the Court should not have done so because by so doing the inherent vice of the methods employed could not be cured or eradicated by leaving the matter to the jury. It was a matter for the Court to determine and not a question of fact to be decided by the jury.

Let us urge again that the Government has no right in

the course of a trap to employ a deception calculated to induce one to act in the belief that he was acting lawfully and then make him undergo the hazard of having a jury decide whether or not he was taken in by the Government's deception—a highly subjective test. That would be an effective method of entrapping even the most innocent and unsuspecting person. It seems ironical that the Government should claim that the doctor should not have been taken in by a deception which it permitted to be practiced upon him with every fraud and falsehood at the command of the entrappers. If the Government is permitted thus to impeach the issuance of prescriptions where such deceptions are practiced by its agents, then physicians would be constrained to deny to patients the prescription of narcotics, required to relieve actual pain and suffering, lest the patient turn out to be an enforcement agent who would claim that he was merely simulating illness and making the assertion that the physician did not "believe" the deception, although there was no proof of such assertion in this case.

In order to justify the trap, the Government, prior to setting the trap, is required to have had reasonable cause to believe that defendant was committing crimes of the nature involved.

DeMayo v. *U. S.*, 32 Fed. (2d) 472, 474-5;
Fiske v. *U. S.*, 279 Fed. 12;
Partan v. *U. S.*, 261 Fed. 515;
U. S. v. *Reisenweber*, 288 Fed. 520;
Lucadamo v. *U. S.*, 280 Fed. 653, 657, 658;
Weathers v. *U. S.*, 126 Fed. (2d) 118, 119.

In the absence of such prior "reasonable cause," the only other proof by which the trap possibly may be justified,

is that the defendant actually had engaged in a continuous series of similar crimes, prior to the trap.

Weiderman v. *U. S.*, 10 Fed. (2d) 745;
U. S. v. *Becker*, 62 Fed. (2d) 1007.

The record herein is entirely devoid of proof on either theory, as we have heretofore shown. The doctor was not in the habit of prescribing narcotics to those addicted to the use thereof. The proof is all to the contrary and brings it within the condemnation pronounced by the Supreme Court of the United States in the case of *Sorrells* v. *United States*, 287 U. S. 435 at 457, where the Supreme Court said:

> "We think that this established principle of construction is applicable here. We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute. This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar the prosecution."

Point VI

The trial court erred in the admission of certain testimony concerning the character of and the examination made by the defendant before he prescribed for his patient.

One of the issues in this case resolves itself around the question as to what is meant by an examination by a doctor of his patient.

Humphries testified that when he first called upon the defendant he told him what he was suffering from (R. 26)

and what Dr. Brady, his physician, had prescribed for him to alleviate his pain. It was morphine sulphate. Objection was then made to a question propounded by the United States Attorney "Before you got this prescription was there any examination of you by Dr. Brandenburg?" on the ground that any answer by the witness Humphries would be to express a conclusion as to what constituted "a medical examination."

The objection was properly taken and the Court, in overruling it, committed error. Such a question as asked by the United States Attorney is an attempt to prejudice the minds of the jury and to implant in their minds a suspicion at least that the doctor was not acting in good faith when he took the word of his patient as to his ailments and his sufferings and that he should have gone further before he prescribed for him.

What is said of the examination of Humphries applies as well to the witness VanPelt who also described his alleged ailments to Dr. Brandenburg (R. 134-136) before he prescribed for him.

In a further attempt to question the good faith of Dr. Brandenburg, a Dr. Markel connected with the Government Marine Hospital was called to testify with respect to an examination that he made of the witness VanPelt in the month of September 1944 (R. 173). This was a purely physical examination. Apparently, he asked VanPelt no questions nor were the subjective symptoms that VanPelt related to Dr. Brandenburg related to Dr. Markel. However, Dr. Markel admitted on cross examination that a history of the case—that is, the subjective symptoms—are important and that it is for the doctor when seeing a patient to determine according to his best judgment and knowledge how much weight he will give to what his patient tells him.

Humphries also was examined by a Dr. O'Connor of the

Marine Hospital in July 1944. He testified that Humphries "had no disease requiring the use of narcotics" (R. 203). Humphries told the doctor nothing about his gall bladder trouble that he had told Dr. Brandenburg he was suffering from, mentioned nothing to the doctor concerning his addiction to the use of narcotics, although he had testified that in July, 1944, he was addicted to the use of drugs. Dr. O'Connor added that Humphries was sent to him to have a check-up on his urine and that he found, as we said before, "that he had no disease whatever that required the use of narcotics" (R. 205). He made no other examination and took no history of the patient although he admitted that in certain cases the taking of a history is highly important (R. 205).

No person should be deliberately led astray. The first duty of the agents of the government in this case, knowing what they did know about Humphries, was to warn the defendant that Humphries was simulating a disease with which he was not afflicted. After such warning, which is customary, if the doctor persisted in prescribing narcotics, that is another story. In this case, the government agents deliberately refrained from so doing, and instead, had Humphries examined at the Marine Hospital for the obvious purpose of giving him a clean bill of health in case he was called upon to testify against the defendant, and, of course, the examination of VanPelt (agent or informer) was for the same purpose.

If there had been proof on the part of the government that no doctor, acting in good faith, would or should have prescribed narcotics to Humphries and VanPelt after simply listening to the complaints from which they were suffering then a question might have been presented for the jury to determine as to whether or not they believed the informers on the type of examination made by the defendant or

his own account of what took place. But to leave this question to the jury in the absence of expert testimony as to what is required in these circumstances under good medical practice was error.

If the character of examination which a physician gives a patient can be inquired into and its sufficiency determined or the matter of good medical practice passed on by a jury in connection with the enforcement of the Narcotic Law, it amounts to regulation of medical practice in the States, which is prohibited by the Constitution or at least would cast doubt on the constitutionality of the law. See *Linder* vs. *United States,* 268, U. S. 5.

It must be kept in mind that the accused is not charged with malpractice of his profession or inefficiency. While Humphries and VanPelt testified that no examination was made by accused the facts are that he did, before prescribing, obtain a medical history of their cases, and if the accused considered this sufficient and adequate that constituted an examination. Holding otherwise amounts to the Court saying what is and what is not good medical practice, which is something exclusively in the field of State supervision. The trial court erred in admitting this character of testimony and should have stricken it from the record, especially the categorical statements of Humphries and VanPelt that "no examinaiton" was made. They were laymen and not shown to have been qualified to answer the questions. Further, the jury did not believe the testimony of Humphries that no examination was made when he first appeared before the accused and obtained a prescription, but determined that the relationship of doctor and patient existed. Since this relationship existed as to the first count in the indictment, the government did not sustain by competent testimony beyond a reasonable doubt that this relationship of doctor and patient was, thereafter, terminated.

Point VII

There was a fatal variance between the charges in the indictment and the proof.

The language of each count in the indictment is the same excepting the names of the persons (Humphries and VanPelt) for whom the prescriptions were issued, likewise the dates and the quantities.

As we have heretofore shown, the doctor is charged with having feloniously sold to Humphries, in the first six counts, and to VanPelt, in the last five counts, morphine sulphate, intending that they should obtain the drug from a druggist upon prescription and that neither one of them "then and there required the administration of morphine sulphate by reason of any disease." Each count then charges that "the defendant did not sell the drugs for the purpose of treating any disease but that the drugs were sold in the form in which such drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their cravings therefor and were adapted to such consumption and were so sold and bought."

Under the decisions of the Supreme Court of the United States, drug addiction is a disease (*Linder* v. *United States*, 268 U. S. 5), and morphine sulphate or other drugs may be administered by a physician in the curing of such disease or entrusted to the care of the patient afflicted therewith. Therefore, it having been proven that Humphries was an addict (although the doctor did not know it) and that VanPelt claimed to be suffering from pleural pains and addicted to the use of morphine to alleviate such pains, there is a failure of proof on the charge that either one of them "were not then and there suffering from any disease which required the administration of morphine sulphate."

There is no proof that the doctor "sold" prescriptions so that Humphries and VanPelt could have them filled

for use by other persons addicted to the use thereof to satisfy their cravings. The mere fact that it is charged that the types and quantity of the drug prescribed were adapted to the use of persons who consumed them to satisfy their cravings is immaterial. This fatal variance between the charge in the indictment and the proofs is, we urge, substantial and instead of submitting the case to the jury for its determination this is one of the reasons why the Court should have directed a judgment of acquittal.

The proofs in the instant case as presented by the government were all for the purpose of attempting to show that the defendant knew before he prescribed, that his patients were drug addicts and that he violated the law when he prescribed for them. Such is not the charge in the indictment. Hence, the fatal variance which we urge.

Variance between charge and proof may arise because of variance between the dates charged in an indictment and the proof of the actual occurrence of the crime charged. If within a reasonable time there is no prejudice. If on proof of a charge of conspiracy there is developed two or more conspiracies, if testimony is admitted concerning one conspiracy which does not prejudice the defendant as to the other conspiracy, that again is not error. But in the instant case where the defendant is not charged with prescribing for addicts but the whole proof of the government is so directed, this is highly prejudicial and comes within the principles (and broad ones at that) laid down in *U. S.* v. *Berger*, 295 U. S. 78.

POINT VIII

Conceding that both Humphries and VanPelt were drug addicts petitioner did not violate the law in giving them prescriptions.

On this point the Court in the *Linder* case, *supra*, held that drug addiction was a disease and that a physician

had a right to prescribe morphine sulphate to such a person in reasonable quantities. There is no evidence whatever in this record that the quantities prescribed for Humphries and VanPelt were unreasonable in amount necessary to relieve pain and suffering, particularly in view of the fact that the Medical Department in the Marine Hospital wrote a letter to the Treasury Department indicating to them that Humphries may need the use of narcotics at some time. There was no evidence upon which a jury could find otherwise. The Circuit Court of Appeals was in error in sustaining the judgment of the lower court. The Circuit Court of Appeals erred in failing to reverse the judgment of the District Court convicting the petitioner on account of the fact that it permitted testimony with reference to prescriptions given by petitioner to Edna Wempler and Mary Muller and the statements relating thereto to remain in the record after the offer in evidence of the prescriptions issued to said persons was withdrawn and the Court had stated it would not permit such prescriptions to be introduced in evidence. There was no evidence of any illegal sale of narcotics or any illegal prescriptions issued to such persons and there was no charge of any illegal act in connection with those prescriptions, which did not appear in the evidence before the Court and jury. Yet such testimony was highly prejudicial to the petitioner and probably influenced the jury in its verdict of conviction. Even if the petitioner as an experienced physician had been deceived by the patients as to their physical condition and their medical history and due to this misconception he erroneously diagnosed the cases as gall bladder in the case of Humphries or as pleurisy in the case of VanPelt, and the true disease was drug addiction, the doctor was still within his legal rights in prescribing morphine sulphate for such disease. This Court in the *Linder* case held that drug addiction was a disease and that doctors had a right to

prescribe morphine in connection with it. As to the quantities prescribed, there is no evidence whatever that they were not in accordance with proper medical practice in such cases even if petitioner had known that they were drug addicts.

Point IX

Prejudicial Error in the Record

Narcotic agent, Belmont, made inquiry of petitioner on September 12, 1944, when petitioner had been accused of the offense alleged on that date as to other prescriptions he had written. Petitioner told the agent of other prescriptions to one Edna Wempler and one Mary Muller. No criminal offense is alleged or charged on account of these prescriptions and, on objection of petitioner's counsel, their offer in evidence was introduced, yet the statements of petitioner in regard thereto and the circumstances surrounding such prescriptions remaining in the record are highly prejudicial to petitioner, and the fact that the offer to put them in evidence was withdrawn does not purge the record of the effect of such testimony concerning them on the jury. It might well be that this testimony had a determining or controlling effect on the jury.

In connection with such a situation of prejudicial statements remaining in the record or questions asked, although not answered the Circuit Court of Appeals in the case of *Towbin* v. *U. S.*, 93 F. (2d) 861, said "the reference made in the direct examination of the agent in the Bureau of Narcotics to the fact that the office of appellant (physician) had been under observation, the proof that Fina Pyles had visited it, the reference to them as persons who had recently pleaded guilty and the question whether they were known addicts, even though that question went unanswered, all considered together, were reasonably calculated to create

in the minds of the jury the belief that such persons had some illicit connection with appellant respecting the sale and disposition of narcotics—perhaps as purchasers of the quantities described in the indictment or as a general outlet; and bearing in mind that prejudice commonly existing against one who is known to engage in the illicit sale and dispensation of morphine, it cannot be said that the effect was harmless. On the other hand, it was prejudicial, subtle suggestions, references and innuendoes of a prejudicial nature, which have no basis of fact and stands fatal to a fair trial and cannot be sanctioned." See *Berge* v. *U. S.*, 295 U. S. 78; *Fontanello* v. *U. S.*, Ninth Circuit Court of Appeals, 19 F. (2d) 921; *Turk* v. *U. S.*, 20 F. (2d) 129. The above quotation is from Judge Bratton's concurring opinion. However, the authority cited warrants the statement or law involved.

The Circuit Court of Appeals in this proceeding should have reversed the trial court on this point, if for no other reason.

Point X

The judgment of the United States District Court should have been reversed and set aside by the Circuit Court of Appeals for failure of the District Court, when informed of the conduct of one of the members of the jury and of the presence of his wife in and near the courtroom during the trial.

While the jury were deliberating one of counsel for the defendant was informed that the wife of one of the jurors had attended the trial and had conversed with the defendant's wife, who was also present at the trial, and who was antagonistic to him, to say the least.

Counsel on being so informed reported the matter to the Court while the jury was out, and the juror's wife was

called to the bench by the Court and informed the Court that she had not conversed with defendant's wife until the last day of the trial.

Upon further investigation of the matter by counsel and on the information which was obtained, an application was made to the Court to set aside the verdict, and the reasons therefor are contained in the formal petition of the defendant (R. 390).

The Court granted a hearing on the petition (R. 392). One of the Court bailiffs (Mrs. Ward) was first called (R. 394). She had the duty of guarding the jury while they were in attendance during the trial. One of the jurors, speaking to her in the corridor outside the Court, questioned her as to the propriety of the juror's wife coming and listening to the trial. She informed him that it was not proper because the judge had said to the jury not to discuss the case with anyone, not even with one's own family, and the bailiff added that if his wife were there the natural thing would be to discuss the case with her. Thereupon, the juror replied to the bailiff "All right, I won't bring her." The bailiff then testified that she saw the juror's wife in the court room during the trial on at least three occasions.

Another bailiff, Mrs. McLaughlin (R. 397), testified that on the Wednesday preceding the last day of the trial that she saw the defendant's wife and the juror's wife together right outside the court room door. The bailiff could not say that she saw them speaking but "they were together" and with them was another person, "a little gray-haired lady."

The clerk of the Court, Miss McGurty (R. 398) was also called as a witness and testified that the juryman referred to was juryman #10 and that his name was Danielson and that he came from Dover, New Jersey.

She also testified that she knew Mrs. Brandenburg, the

wife of the defendant, and told of a conversation which took place on the last day of the trial in the ladies' room, at which she was present as well as Mrs. Brandenburg, "a little lady" and Mrs. Danielson (the wife of Juryman #10).

The next witness called was Harry Simon (R. 402), a Deputy Marshall who was stationed at the front door of the court room during the trial of the case. He testified that Mrs. Brandenburg was present during the whole trial and that the day before the summations started he saw Mrs. Brandenburg and Mrs. Danielson, the juror's wife, converse. They were sitting on one of the marble benches in the corridor together with another lady (R. 403).

He also testified that he saw Mrs. Brandenburg and the juror's wife together on another day during the trial, in the corridor, although he does not recall whether they were sitting or standing (R. 404).

The Deputy Marshal also testified that Mrs. Danielson, the wife of the juror, was present in the court room when motions were being made to the Court in the absence of the jury, the jury having been excused so that they could not hear the motions (R. 404).

A Mr. Willard (R. 405) was also called. He was a spectator during the trial and was present during the entire trial except the last day. He had a conversation with Mrs. Brandenburg, the wife of the defendant, and saw Mrs. Brandenburg converse with Mrs. Danielson, the wife of the juror, and another lady who was identified as a Miss Rhodes, being the same person referred to in the testimony of the previous witnesses as "the little gray-haired lady." Willard overheard a conversation between Mrs. Brandenburg and Mrs. Danielson, the wife of the juror, prior to the last day of the trial in which he heard Mrs. Brandenburg say something to Mrs. Danielson "about an abortion racket." "* * * they were all sitting there together

• • •" (the corridor), "she was talking to the two of them." Mrs. Brandenburg "had two pictures in her pocket" and "• • • brought them out." "• • • she spoke about this child and about a letter and about the lawyer's wristband for $175, • • •". She also said to them that if she could bring her son there he could testify about Dr. Brandenburg's activities about an abortion ring. She also made some mention of four gangsters and that she was afraid of her life. The witness did not recall that she said anything about narcotics except if her son were there he could testify as to what happened in the doctor's office. Her reference to the wristband or wristwatch for the "lawyer" was in connection with her complaint to these women that she, Mrs. Brandenburg went around either without any money or without any clothes.

Mrs. Danielson, the juror's wife, was called by the District Attorney (R. 421), and she admitted her presence in court and meeting "the little lady" Miss Rhodes, but denied having any conversation with Mrs. Brandenburg in which she spoke ill of her husband, and that the conversation did not take place until the jury was out and that the conversation took place in the court room and not in the corridor (R. 425).

The District Attorney also called Miss Rhodes (R. 428) and she testified that Mrs. Danielson had no conversation with Mrs. Brandenburg "until the day after the trial • • • in the washroom" (R. 429). Her only conversation with Mrs. Brandenburg during the trial, so she says, "It was all about her children. I even offered to make a pair of socks for her boy." She admitted however that she had had lunch with Mrs. Brandenburg twice during the trial (R. 430). Undoubtedly, however, she had heard something about the wristband because she offered to tell the Court about it (R. 430).

The juror, Mr. Danielson, himself was called by the District Attorney (R. 431), and over the objection of counsel he was interrogated by the Court and he said in substance that he had not disobeyed the admonition of the Court not to discuss the case with anyone, although it already had appeared that his wife drove him back and forth between Newark and Dover during a part of the trial because he was suffering from a heart complaint.

While it does not appear in so many words in the record, the Court knew and counsel knew that Mrs. Brandenburg was antagonistic to her husband, the defendant. This can with all propriety be spelled out from the fact that counsel promptly called to the Court's attention that he had received information that Mrs. Brandenburg had been conversing during the trial with the wife of the juror as soon as he was informed of this, although such information was not brought to counsel until the jury had actually retired (R. 393).

It is undisputed that the juryman permitted his wife to sit in the court room during the trial despite the admonition of the bailiff. It is undisputed that the juror's wife was present in court when he and the other jurors were excused so that argument might be made to the court freely in the absence of the jury so as not to prejudice the defendant or the Government in any way. This is tantamount to the juror being present and hearing such arguments as it must be presumed that his wife conveyed the information to him. It is undisputed that the juror's wife conversed with the defendant's wife. There is a conflict of testimony as to when and where these conversations took place and their purport. It is undisputed that the juror's wife drove him back and forth between their home in Dover and the Court House in Newark.

In the situation presented to the Court, despite any con-

flict of testimony as to what the conversations were and when the conversations took place between Mrs. Brandenburg and the wife of the juror, we feel it is beside the question.

Paraphrasing the language of Judge Cardozo in the case of *Clark* v. *United States,* 289 U. S. 1, where a woman juror was up for contempt "it is next to impossible" that the wife of the juror who was with him in the courtroom refrained from telling him of her experiences on their trips back and forth between Dover and Newark. Their denials that there was any conversation about the case and the denials of the juror's wife that she heard anything from Mrs. Brandenburg which reflected upon the character or reputation of the defendant, we feel is also immaterial. The situation at the best was a very unwholesome one so far as the administration of justice is concerned and we urge that after the court heard the testimony of the bailiffs and the Deputy Marshal, to say nothing of the testimony of the witness Willard, he should have set the verdict aside and should not have permitted an issue to be raised as to when and if conversations between the wife of the defendant and the wife of the juror, and the substance thereof, or to even inquire, in view of the presence of the juror's wife in the court room, as to whether or not husband and wife had discussed matters concerning the case in their trips back and forth to court. The honor and good name of the juror and his wife are not brought into question and should not have been. The situation as disclosed by the court officers was sufficient to compel the Court to set the verdict aside.

> "In all trials for felony it was necessary at common law to keep the jury together in charge of an officer, and not to permit them to separate from the time of their being impanelled and sworn; * * *" (16 *Corpus Juris,* p. 1075, Sec. 2527).
>
> "The prominent object of the rules respecting the

seclusion of jurors is to secure them from improper influences. Thus, as declared in early cases, to keep the jury entirely aloof and free from contact or communication with other parties than the bailiffs who have them in keeping during the trial is absolutely necessary if the case is to be tried by an impartial and unbiased jury and the constitutional rights of the defendant are to be protected'' 53 American Jurisprudence, p. 627.

In *McLain* v. *State,* 10 Yerg (Tenn.) 241, 31 Am. Dec. 573, the court used the following language:

> "The right of trial by jury has always, in England and in this country, been considered of such vital importance to the security of the life, liberty and property of the citizen that great care has been taken to preserve it unimpaired. That the person accused may have the full benefit of a judgment by his peers, it is absolutely necessary that the minds of the jurors should not have prejudged his case, that no impression should be made to operate on them, except what is derived from the testimony given in court, and that they should continue impartial and unbiased. These objects can only be obtained by selecting those who have no preconceived opinion as to the guilt or innocence of the prisoner, and by not permitting them to separate from each other after they have been sworn and mingle with the rest of the community'' (53 American Jurisprudence, p. 627).

We cite the foregoing authority in support of the argument which we have advanced. As we have said before, the situation as presented to the Court on the motion to set aside the verdict does not resolve itself around a question of veracity. In derogation of the common law rule with respect to sequestration of the jury until a verdict has been reached, modern courts have permitted jurors to mingle freely with the public after court hours and to return to their homes where the trial lasts for longer than

a single day, usually with instructions not to converse with anyone concerning the case being tried, and to refrain from reading newspaper articles concerning the case. Ordinarily this method of procedure works satisfactorily.

We urge however that as soon as a situation is pointed out to the court like the situation in the instant case that where the juror might have been influenced, that inquiry as to whether or not he was influenced is beside the point, and after it was shown that the wife of juror number 10 was in the court room when he was not permitted to be present and that she did meet and had the opportunity of conversing with the wife of the defendant who was antagonistic to him, that the Court having due regard for the constitutional rights of the defendant for a fair and impartial trial should, as we have said before, have set the verdict aside.

In this case the court was in error in inquiring as to actual conversations between husband (juror) and wife—while such inquiry would have been appropriate in any case except that of man and wife—it was not appropriate in this case due to the necessary presumption, as referred to by Justice Cardozo referred to herein.

Conclusion

The writ of certiorari should be granted.

Respectfully submitted,

FREDERIC M. P. PEARSE,
SAMUEL L. HIRSCHBERG,
MARSHALL R. DIGGS,
CHARLES M. TRAMMELL.

Dated this 31 day of July, 1947.